Filed 12/18/20 P. v. Hernandez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANKIE RUDY HERNANDEZ, Defendant and Appellant.	F077379 (Super. Ct. No. VCF313733) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

SEE CONCURRING OPINION

INTRODUCTION

Appellant Frankie Rudy Hernandez was convicted by jury of second degree murder (Pen. Code,[1] §§ 667, 187, subd. (a)). In addition, the jury found true enhancements alleging Hernandez personally and intentionally discharged a handgun in the commission of the offense, proximately causing the death of another human being (§ 12022.53, subds. (b)-(d)), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct of gang members (§ 186.22, subds. (b)(1)(A) & (b)(5)).

Hernandez was sentenced to an indeterminate term of 40 years to life in state prison. Hernandez received 15 years to life on his conviction of second degree murder with a consecutive prison term of 25 years to life for the firearm enhancement. The court ordered this term to run consecutive to a four year prison sentence following Hernandez's conviction in an unrelated case. In addition, the court imposed a $10,000 restitution fine (§ 1202.4, subd. (b)), a victim restitution award in the amount of $5,000 (§ 1202.4, subd. (f)), a $10,000 parole revocation restitution fine (§ 1202.45), a $40 court operations assessment (§ 1465.8, subd. (a)(1)), and a $30 conviction assessment fee (Gov. Code, § 70373, subd. (a)(1)).

On appeal, Hernandez raises the following contentions: (1) the admission of the gang expert's testimony as to the primary activities of the Northern criminal street gang violated *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); (2) the admission of the expert's testimony as to the predicate offenses of the gang violated *Sanchez*; (3) his case should be remanded for an exercise of discretion by the trial court to consider striking the firearm use enhancement applied to his sentence; (4) he is entitled to a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), so he can prepare a record for his

---

1 All undefined statutory citations are to the Penal Code unless otherwise indicated.

future youth offender parole hearing; and (5) he is entitled to a hearing on his ability to pay the restitution fine imposed pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

STATEMENT OF FACTS

On August 22, 2013, at approximately 10:00 p.m., David Munoz and Isaac Vasquez were walking on the Santa Fe trail in the City of Tulare when they encountered several individuals standing around a parked vehicle. One of the men asked Munoz and Vasquez who they were. Vasquez replied, "Bandit." One of the men responded, "West Side Tula," a reference to a criminal street gang in Tulare. They asked Munoz and Vasquez, " 'How's that Norte life?' " Munoz and Vasquez continued walking and did not respond. They walked half a block further when a man emerged from the shadows.

The man asked Vasquez, " 'Hey what's your name?' " He asked, " 'You're Bad Boy, aren't you?' " Vasquez replied, " 'No' " but the man insisted, " 'Yeah, you are him.' "

Moments later, the man drew a gun and began firing upon Vasquez. Vasquez and Munoz ran in different directions. Munoz heard approximately seven more shots as he was running. Although Munoz escaped, Vasquez was shot three times.

Officer Richmond with the Tulare Police Department responded to the scene. Several people pointed Officer Richmond to the front yard of a nearby home where Vasquez was lying down. Vasquez was bleeding heavily. When questioned, Vasquez stated a "Northerner gang member" had shot him, but he refused to identify the individual who had shot him. Vasquez asked Officer Richmond how bad he thought his injuries were. Officer Richmond told Vasquez he thought Vasquez was going to die.

After hearing Officer Richmond's response, Vasquez told Officer Richmond someone named Frankie had shot him. Vasquez explained he was shot because he was a Northerner dropout and that Frankie was a Northerner. Vasquez lost consciousness shortly thereafter. He died as a result of his injuries.

During their investigation, police discovered a watch on the ground near the trail and swabbed it for DNA. It was taken into evidence.

An autopsy of Vasquez's body was performed several days later. The autopsy revealed Vasquez had been shot in the arm, back, and buttocks. The pathologist also noted the presence of blunt force trauma on the back of Vasquez's head and incised wounds on his scalp.

A few days after the shooting, Munoz was detained during a traffic stop. He went to the police department and gave a statement about the shooting. Munoz described the shooter as a light-skinned, Hispanic male, approximately five feet seven inches in height. When he was shown a photographic lineup of six men, Munoz identified an individual by the name of Frankie B. as the suspect. He was not positive the individual whom he had identified was the shooter.

Nearly two years later, Munoz was shown another photographic lineup. Munoz said the men in two photos resembled the shooter. One of these men was appellant Frankie Rudy Hernandez.

In October 2013, Hernandez was detained with Patrick Ragland and Adrian Meraz following a traffic stop. Hernandez, Ragland, and Meraz were being investigated for a string of burglaries, and a DNA swab was performed on Hernandez during the course of the investigation. DNA found on the watch that was recovered on the night of Vasquez's murder matched DNA that was collected through a buccal swab of Hernandez's cheek.

In 2015, Sergeant Jon Hamlin and Detective Ray Guerrero spoke to Hernandez about the fact that his DNA had been found at the scene of Vasquez's murder. Hernandez denied knowing Vasquez, he offered no specific details about his whereabouts at the time of the murder, and he did not have an explanation for the presence of his DNA on the watch police recovered on the night of the shooting.

The Informants

Moses Vela

Moses Vela was a former Norteño gang member who was personally acquainted with Hernandez. Vela also knew Vasquez.

On December 10, 2014, while Vela was in custody, he spoke with Detective Guerrero about the murder of Vasquez, whom Vela knew as "Bad Boy." His statements were recorded, and transcripts of his statements were given to the jury at Hernandez's trial.

On the night of the murder, Vela claimed he had been walking to Hernandez's house to pick up a firearm. As Vela neared Hernandez's home, he heard at least several gunshots. Vela looked in the direction of the gunfire and saw Hernandez running from the east, holding a gun like a hammer. Hernandez made statements to the effect that he had gotten someone. Anticipating the arrival of police, Vela fled.

Vela encountered Hernandez again while Hernandez was in jail for some burglaries. Hernandez told Vela that he had killed Vasquez as punishment for dropping out of the Norteño gang.

Although Vela claimed he "was just making up stories," and stated he was actually locked up when Vasquez was murdered, he admitted he had told Detective Guerrero that Hernandez had killed Vasquez because Vasquez was a Norteño dropout. Vela told Guerrero that Hernandez was a Norteño squad leader.

Ralph Padilla Zavala

Ralph Padilla Zavala became acquainted with Vasquez while they were both incarcerated. Like Vasquez, Zavala was a Northerner dropout.

Zavala was also familiar with Hernandez, whom he had met during his incarceration at Donovan State Prison. Zavala and Hernandez were both from Tulare County and often socialized with one another in the prison yard. On one occasion, Hernandez spoke with Zavala about the murder of Vasquez.

The district attorney's office subsequently received a letter from Zavala stating Hernandez had provided him with a step-by-step account of Vasquez's murder. As a result of this letter, Sergeant Hamlin and Detective Guerrero spoke to Zavala. Zavala's statements were recorded, and transcripts of his interview were provided to the jury.

Hernandez told Zavala he had been at home smoking marijuana with a fellow gang member when he saw Vasquez walking nearby. When Hernandez and his companion went outside and confronted Vasquez, a physical confrontation ensued. During the confrontation, Hernandez claims his companion pulled out a firearm and proceeded to pistol whip Vasquez. Vasquez was eventually able to free himself. He was shot three times when he fled the scene. Hernandez initially told Zavala that his companion had fired the fatal shots. However, in a subsequent conversation, Hernandez admitted he had been the one who had produced the firearm, pistol whipped Vasquez, and shot Vasquez while he was attempting to flee.

Hernandez also told Zavala his watch had fallen off during the confrontation and was later found at the scene by police. Hernandez expressed concern that the watch contained his DNA.

At trial, Zavala did not recall many of the statements he had made to Sergeant Hamlin and Detective Guerrero. He claimed he was under the influence at the time he spoke to them.

Gang Evidence

Detective Guerrero participated in the investigation of Vasquez's murder. He also testified at Hernandez's trial as an expert on criminal street gangs.

Guerrero worked in the gang unit in the City of Delano from 2011 to 2012. In 2012, he began working for the Tulare Police Department, where he was subsequently promoted to the gang unit. Over the course of his career, he worked on numerous gang-related crimes, ranging from petty theft to homicide. Detective Guerrero had studied the Northern street gang active within the City of Tulare. He also had contact with numerous

former and active gang members throughout the course of his investigations during consensual encounters and arrests.

According to Detective Guerrero, there are at least 250 Norteño gang members throughout the City of Tulare, and even more scattered throughout the county. The Norteño street gang commonly uses the number 14, which is symbolic of the letter N, which pays allegiance to the Nuestra Familia. Guerrero opined the Norteños are a street gang, whereas Nuestra Familia is a prison gang. The Norteños also use common signs and colors, including: X4, the huelga bird, and the color red. They often wear San Francisco 49ers clothing or San Francisco Giants apparel. Norteños generally display the same gang tattoos, such as four dots, Tula, WST, EST, Norte, Norteño, and Norteño for life.

Guerrero explained the Northerners in Tulare commonly operate within subsets. These subsets include: East Side Tula, West Side Tula, West Side Norteño Gangsters, West Side Locs, and the Van Klen Posse. The subsets often conduct operations together under the same overarching Northern umbrella.

With respect to the instant case, Detective Guerrero opined that at the time of Vasquez's murder, Hernandez was an active Norteño gang member and that he had committed the murder for the benefit of the Northern gang. Guerrero explained that Vasquez was a dropout, and dropouts are commonly targeted by the gang. Further, Vela had told Guerrero that Hernandez was a squad leader. Guerrero explained that in gang culture, a squad leader is tasked with maintaining control over a given area operated by the gang, and with taking care of dropouts. Guerrero opined the murder would benefit the gang because killing a dropout would bring respect to the gang by fulfilling its "blood in/blood out oath."

In opining that Hernandez was active gang member Detective Guerrero relied upon multiple factors. Guerrero had personally observed numerous gang-related tattoos on Hernandez, including the word "East" tattooed on his right wrist and the word "Tula"

on his right forearm. Guerrero explained these tattoos represent the East Side Tula subset of the Northern street gang. Hernandez also had a 49ers tattoo on his neck and on his left shoulder, as well as the letters "SF" tattooed on his left hand.

When Detective Guerrero interviewed Hernandez in prison, Hernandez admitted he associated with Northerners. Hernandez was able to identify other individuals whom he knew to be Northern gang members, including Chris Burris, a high-ranking Northerner in Tulare County. According to Guerrero, this was significant because low-ranking gang members are not permitted to associate with high-ranking members.

Detective Guerrero had also previously met Hernandez when Guerrero was counseling at-risk youth. Hernandez had just begun to get involved in gangs and Guerrero tried to steer him to a different path.

In forming his opinion, Guerrero stated he had also relied upon multiple prior contacts described by officers who testified at Hernandez's trial.

In October 2009, Detective Espinosa contacted Hernandez while Espinosa was searching for a wanted suspect. Hernandez was in the company of two other known Norteños, William Moreno and Daniel Ramirez. During a search of the vehicle, Espinosa located a firearm under Hernandez's seat. Detective Espinosa heard Moreno tell Hernandez " '[t]his is your first offense. You need to take this.' " Moreno told Detective Espinosa that Hernandez had something to tell him. Hernandez claimed the firearm was his. He was ultimately charged with possession of the firearm.

Between 2007 and 2013, Officer Jess Guzman with the Fresno Police Department contacted Hernandez multiple times. When asked about his gang status, Hernandez admitted to being a Northerner multiple times. Officer Guzman was also present during the October 2009 incident where Hernandez was detained. Hernandez told Officer Guzman that Moreno had told him to take the rap for the gun. Moreno was a higher-ranking gang member.

Officer Jacob Adney with the Tulare Police Department described two prior field interviews with Hernandez. In February 2012, during a consensual encounter, Adney contacted Hernandez with George Moreno, another known Northern gang member while the two were at a known Northern hangout. Hernandez and Moreno were in possession of gang paraphernalia. Adney also observed an Aztec tattoo on Hernandez, which is common among Norteño gang members. Hernandez told Adney he was a Norteño gang member.

In October 2013, Officer Adney contacted Hernandez again during a traffic stop. Hernandez was in the company of Adrian Meraz, a known Norteño gang member. During the contact, Hernandez admitted he was a Norteño gang member.

In February 2013, Detective Espinosa contacted Hernandez in the City of Tulare. Hernandez was in the company of George Sanchez, a known Norteño gang member.

DISCUSSION

I. Admission of the Gang Expert's Testimony as to the Primary Activities and Predicate Offenses of the Northern Gang Does Not Warrant Reversal

Hernandez contends the gang expert related case-specific, testimonial hearsay in testifying to the primary activities and predicate offenses of the Northern gang. (§ 186.22, subds. (b), (e), (f).) According to Hernandez, this testimony violated *Sanchez, supra*, 63 Cal.4th 665 and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The People maintain the gang expert's challenged testimony constitutes non-case-specific general background information about the gang, which is permissible under *Sanchez*.

We agree with the People. The expert's testimony related to the primary activities and predicate offenses are more appropriately characterized as background information,

not case-specific facts, and a gang expert is permitted to testify about such information, even if it is technically hearsay.[2]

A. Evidence Relevant to the Primary Activities and Predicate Offenses of the Northern Gang

With respect to the primary activities of the Northern gang, Detective Guerrero testified Northern gang members commit the following crimes: "assaults on rival gang members, burglaries, robberies," as well as "[w]itness intimidation, homicide, [and] attempted homicide." Guerrero's opinion was presumably based upon multiple sources.

Over the course of his career, Guerrero personally investigated numerous gang crimes, including "homicide and attempted homicide." In addition to his experience, Guerrero has undergone approximately 300 hours of training relating to criminal street gangs, including Northern criminal street gangs. Detective Guerrero also learned about the Northern gang from speaking to active gang members, interviewing dropouts, and utilizing confidential informants.

To prove the gang had committed a pattern of criminal activity, Guerrero described two predicate offenses by subjects whom he had opined were active members of subsets of the Northern gang. As to the first predicate offense, Detective Guerrero described an attempted homicide committed by Paul Peña, an East Side Tula gang member. Guerrero was not personally involved in the investigation of the crime. He referenced reports generated in the case and spoke to the officers who had investigated the crime.

---

[2] This issue is currently pending in the California Supreme Court. (*People v. Garcia* (July 10, 2018, F073515) [nonpub. opn.], review granted Oct. 17, 2018, S250670; *People v. Valencia* (July 10, 2018, F072943) [nonpub. opn.], review granted Oct. 17, 2018, S250218.) These cases present the following issues: Does gang expert testimony regarding uncharged predicate offenses to establish a "pattern of criminal gang activity" under Penal Code section 186.22, subdivision (e) constitute background information or case-specific evidence within the meaning of *Sanchez*, *supra*, 63 Cal.4th 665? Was any error prejudicial?

On March 31, 2011, responding officers located three victims who had suffered gunshot wounds. During their investigation, police learned the three victims were Southern criminal street gang members. Peña was identified as the shooter. He asked the victims whether they "banged." When one of them responded, "Wicked," a term referencing a Sureño subset, Peña produced a firearm and discharged it at the victims four or five times. Ryan Pedron, a West Side Tula gang member, admitted he had supplied Peña with the firearm. Peña was subsequently arrested and convicted of attempted homicide with gang enhancements. His certified records of conviction were admitted into evidence.

The second predicate offense occurred on March 9, 2011, in the City of Tulare. Stefan Torres, whom Guerrero was personally familiar with, was with Mandon Torres, Gabriel Minjares, and Joey Valdez, when they noticed two male subjects, one of whom was wearing a blue tank top. Valdez was a member of the West Side Loco subset of the Northern gang, whereas Stefan Torres, Mandon Torres, and Minjares, were members of the West Side Tula subset. Stefan Torres produced a firearm and began shooting at the two subjects and their residence. The victims identified all four subjects pursuant to an in-field lineup.

A text message in Minjares's phone stated, "Little homie just bucked on some scraps." The text referenced Stefan Torres shooting at Southern gang members. Mandon Torres's certified record of conviction was admitted into evidence.

B. Relevant Law

i. Gang Enhancement Charged Under Section 186.22, Subdivision (b)(1): General Principles

A gang enhancement under section 186.20 et seq., commonly known as the Street Terrorism Enforcement and Prevention Act (the STEP Act), has two prongs—the gang-related crime prong, and the specific intent prong. (*People v. Albillar* (2010) 51 Cal.4th 47, 60, 64-65.) Under the first prong, the People must prove the defendant committed the

underlying crime "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b)(1).) **"**The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.)

In addition, to support the gang enhancement, the People must also prove the existence of the criminal street gang. A " 'criminal street gang' " is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of [section 186.22] subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).)

The " 'primary activity' " element requires the commission of the specified crimes be " 'one of the group's "chief" or "principal" occupations' " as opposed to the occasional commission of those crimes by the group's members. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.) The testimony of a gang expert—founded upon "his personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes"—may supply an adequate factual basis for the primary activities of a gang. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

Additionally, "[e]vidence of both past offenses and the currently charged offenses may be considered in determining whether one of the primary activities of the gang is committing one or more of the offenses enumerated in [subdivision (e) of section 186.22]." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1068.)

To prove the gang's members have engaged in a "pattern of criminal activity" within the meaning of the gang enhancement statute, the People are required to prove the

gang's members "individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) Section 186.22, subdivision (e) defines a " 'pattern of criminal gang activity' " as "the commission of, attempted commission of, conspiracy to commit, ... or conviction of two or more of the [enumerated] offenses, provided ... the offenses were committed on separate occasions, or by two or more persons" within a statutorily defined time period. (§ 186.22, subd. (e). These offenses are commonly referred to as "predicate offenses."

ii. Sanchez and the Distinction Between Case Specific Facts and Background Information

In *Sanchez, supra,* 63 Cal.4th 665, our Supreme Court held that while experts are entitled to rely on inadmissible matters in forming their opinions and are also entitled to explain to the jury the matter upon which they based their opinions (Evid. Code, § 801, subd. (b)), experts are prohibited from relating to the jury case-specific hearsay under state law. (*Sanchez, supra,* at pp. 675-676, 684.) According to the court, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is also a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, fn. omitted; see *id*. at p. 682.)

The *Sanchez* court defined "[c]ase-specific facts" as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) Case-specific facts must be independently proven by competent evidence—such as by the testimony of a witness with personal knowledge of those facts—or they must come within a hearsay exception. (*Id.* at p. 686.) "An expert may then testify about more generalized information to help jurors understand the

significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Id*. at p. 676.)

By contrast, while an expert is not permitted to relate case-specific hearsay, *Sanchez* held "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez, supra,* 63 Cal.4th at p. 676; Evid. Code, § 802 ["A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based."].)

Accordingly, the distinction between case-specific facts and general background information is crucial. "[T]he former may be excluded as hearsay, the latter may not." (*People v. Veamatahau* (2020) 9 Cal.5th 16, 26 (*Veamatahau*).) This is so regardless of whether the case-specific hearsay statement is also testimonial for purposes of the confrontation clause. (*Sanchez, supra,* 63 Cal.4th at p. 685.)

C. Forfeiture/Ineffective Assistance of Counsel

Hernandez concedes his trial counsel failed to object to the expert's challenged testimony under *Sanchez*. *Sanchez* was decided 18 months prior to his criminal trial, yet trial counsel made no reference, at any point, to *Sanchez*.

" 'A party desiring to preserve for appeal a challenge to the admission of evidence must comply with the provisions of Evidence Code section 353, which precludes reversal for erroneous admission of evidence unless: "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion." ' [Citations.] A properly directed motion in limine may satisfy the requirements of Evidence Code section 353 and preserve objections for appeal. [Citation.] However, the proponent must secure an express ruling from the court." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

In the instant case, counsel did not so much as reference *Sanchez* or *Crawford* in his motions in limine, nor did he seek a ruling prohibiting the gang expert from relating hearsay at trial. We conclude trial counsel's failure to lodge a contemporaneous objection to the expert's challenged testimony—which occurred post-*Sanchez*—constitutes forfeiture.

Hernandez argues his trial counsel was constitutionally ineffective for failing to preserve this issue for appellate review. We disagree.

" 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1189; *Strickland v. Washington* (1984) 466 U.S. 668, 669 (*Strickland*).)

Here, the record fails to support Hernandez's claim of ineffective assistance of counsel. As discussed further below, the gang expert's testimony as to the primary activities and predicate offenses of the overarching Northern gang in Tulare was general background information rather than case-specific hearsay. As a result, Hernandez has not shown his trial counsel's failure to object to the expert's testimony on these subjects fell below an objective standard of reasonableness. (*Strickland, supra*, 466 U.S. at p. 688.)

D. Analysis

On appeal, Hernandez challenges Detective Guerrero's testimony regarding the primary activities and predicate offenses of the Northern street gang in Tulare.

i. Primary Activities

Section 186.22, subdivision (e) lists many offenses that may be considered in determining the primary activities of a criminal street gang. However, the jury instructions in this case limited the primary activities of the Northern gang to attempted homicide and shooting at an inhabited dwelling. Our analysis of this issue is therefore

constrained to those crimes. Nonetheless, we have no trouble concluding Detective Guerrero's testimony as to the primary activities of the Northern gang is background information.

In *Veamatahau, supra,* 9 Cal.5th 16, our Supreme Court recently clarified the test for determining whether challenged testimony is background information or case-specific hearsay. Information is background information if the expert would have employed his " 'special knowledge, skill, experience, training, and education' to (1) select a source to consult, (2) digest the information from that source, (3) form an opinion about the reliability of the source based on [his or her] experience in the field, and (4) apply the information garnered from the source to the (independently established) facts of a particular case." (*Id.* at p. 29.)

Veamatahu makes clear that background information does not transmogrify into case-specific facts simply because "of the source from which an expert acquired his or her knowledge." (*Veamatahu, supra,* 9 Cal.5th at p. 30.) As our Supreme Court explained, "[t]he focus of the [*Sanchez*] inquiry is on the *information conveyed* by the expert's testimony, not how the expert came to learn of such information. Thus, regardless of whether an expert testified to certain facts based on composite knowledge 'acquired from sources too numerous to distinguish and quantify' or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same. The background or case-specific character of the information does not change because of the source from which an expert acquired his or her knowledge." (*Id*. at p. 30, italics added.)

Here, Detective Guerrero testified Northern gang members commit the following crimes in particular: "assaults on rival gang members, burglaries, robberies," as well as "[w]itness intimidation, homicide, [and] attempted homicide." He explained that when Northerners commit murder, or attempt to commit murder, it instills fear into the community and rival gangs, and it enhances the gang's reputation.

Over the course of his career, Guerrero had personally investigated numerous gang crimes, including "homicide and attempted homicide." In addition to the fact that he had worked in two gang units since 2011, he had also received approximately 300 hours of training relating to criminal street gangs, including Northern criminal street gangs. Detective Guerrero also learned about gang trends and the inner workings of the gang from speaking to active gang members, interviewing dropouts, and utilizing confidential informants. In forming his opinion about the primary activities of the Northern gang, Guerrero undoubtedly drew upon his skill, experience, training, and education. While some of his opinion testimony may have been based upon speaking to other officers, and reliance upon other hearsay sources, that does not render his testimony case-specific. (*Veamatahu*, *supra*, 9 Cal.5th at p. 30.) We therefore reject Hernandez's assertion that this testimony was improper.

ii. Predicate Offenses

To establish a pattern of criminal activity by the Northern gang, Detective Guerrero described two predicate offenses committed by subjects whom he opined were active gang members. The first offense had occurred on March 31, 2011, when Paul "Plucky" Peña, an East Side Tula gang member, shot a member of a rival gang in the City of Tulare. Guerrero stated Peña committed the shooting with the assistance of Ryan Pedron, a West Side Tula gang member. Peña was convicted of attempted homicide with a criminal street gang enhancement. Guerrero supplied certified copies of Peña's conviction for the offense he had described, which was admitted into evidence without objection.

The second predicate offense occurred on March 9, 2011, when Mandon Torres, Stefan Torres, Gabriel Minjares, and Joey Valdez shot at members or associates of a rival criminal street gang. All four men were subsequently convicted of attempted homicide, and the jury found true enhancements alleging the crime was committed for the benefit of a criminal street gang. Detective Guerrero supplied certified copies of Mandon Torres's

conviction, which was entered into evidence. Guerrero opined Valdez was a member of the West Side Loco subset of the Northern gang, and his co-defendants were members of the West Side Tula subset.

Detective Guerrero was not personally involved with the investigation of either crime underlying the predicate offenses which he had discussed. Although Detective Guerrero was not personally familiar with Paul Peña; he was familiar with Stefan Torres, one of the three gang members who had assisted Mandon Torres in the commission of the second predicate offense.

Guerrero was able to form an opinion about the active gang status of Peña and Mandon Torres because he had researched their backgrounds by looking at his agency's report system, contacting other agencies, and conducting a records' check of the subjects through different databases. He was not asked to explain the foundation for his opinion, nor was an objection lodged on this basis.

There is a split of authority as to whether a gang expert's testimony about predicate offenses entails case-specific facts as contemplated by *Sanchez, or whether such testimony constitutes only general background information.* One view holds that facts related to predicate offenses are "case-specific facts" as defined by *Sanchez*. (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 411 ["Because gang predicate activity is an element of a charged enhancement, it does, in our view, place at issue in the case being tried '*particular events*' "]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 582 (*Ochoa*) [concluding the nondefendants' statements admitting their membership in a criminal street gang was case-specific rather than general background information]; *People v. Lara* (2017) 9 Cal.App.5th 296, 337 [expert's hearsay testimony from police reports generated by non-testifying officers which supplied predicate offenses were treated as case-specific facts].)

The opposing view holds that evidence of a gang's pattern of criminal activities by alleged members is only "general background information," and as such, a qualified

expert may relate hearsay while testifying about predicate offenses. (*People v. Blessett* (2018) 22 Cal.App.5th 903, 943–945, review granted Aug. 8, 2018, S249250; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411; *People v. Meraz* (2018) 30 Cal.App.5th 768, 781 **(***Meraz***)**; *People v. Bermudez* (2020) 45 Cal.App.5th 358, 377 & fn. 13.)

We believe the correct view is expressed in *Blessett*, *Vega-Robles*, *Meraz,* and *Bermudez*. That is, "facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried.' " (*Meraz, supra*, 30 Cal.App.5th at p. 781, italics in original.) A gang expert's testimony regarding the gang's operations, primary activities, and pattern of criminal activities—which is unrelated to the defendant or the crime with which the defendant is charged—"mirror[s] the background testimony the expert gave in *Sanchez*." (*Meraz,* at p. 781.)

Here, Detective Guerrero's testimony regarding the predicate offenses of the Northern criminal street gang within Tulare did not relate "to the particular events [or] participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676.) There is no indication the subjects of the predicate offenses were peripherally involved with either Hernandez or the murder for which he was convicted. The crimes described by Guerrero, and his opinion that these crimes were committed by active members of the same gang to which Hernandez belonged, merely established the existence of the Northern gang. As a result, "[s]uch predicate offenses are chapters in [the] gang's biography and constitute historical background information, not case-specific information." (*Bermudez, supra,* 45 Cal.App.5th at p. 363.) We conclude that under state law after *Sanchez,* Detective Guerrero was permitted to testify to non-case-

specific general background information about the Northern gang, its rivals, its primary activities, and its pattern of criminal activity.[3]

II. Remand is Not Warranted Under Senate Bill No. 620

Hernandez contends this case must be remanded for the trial court to consider whether it would strike the sentence for the firearm enhancement based on the enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620). The People argue remand is inappropriate here; Senate Bill No. 620 was in effect several months before Hernandez was sentenced. As a result, the trial court is presumed to have been aware of and to have followed the applicable law. In a supplemental brief, Hernandez asserts his trial counsel was constitutionally ineffective as a result of failing to raise this issue in the trial court below. We conclude that remand is not warranted, and we reject Hernandez's claim of ineffective assistance of counsel.

A. Senate Bill No. 620

Hernandez contends he is entitled to remand to allow the trial court to determine whether to strike the gun use enhancement applied to his sentence. He acknowledges Senate Bill No. 620 was already part of the legal landscape at the time he was sentenced.

However, according to Hernandez, the trial court was unaware it had discretion to strike the gun use enhancement because (1) the probation report incorrectly asserted " '[t]he court has no discretion in setting the term' " in his murder case, and "the

---

[3] The People further argue that even if Detective Guerrero's testimony as to the predicate offenses were case-specific, the admission of this evidence is harmless because the predicate crimes were independently proven by certified court records. Though we do not address prejudice, we observe that while the certified records of conviction show Peña and Mandon Torres committed crimes for the benefit of a criminal street gang, these documents do not specify which criminal street gang to which Peña and Torres belonged. For purposes of the gang enhancement, though the predicate offense need not be gang related (*People v. Ochoa, supra*, 7 Cal.App.5th at p. 581), the People must show the subjects of the predicate offenses are members of a criminal street gang, the same gang the defendant sought to benefit. (*People v. Prunty* (2015) 62 Cal.4th 59, 85.)

mandated term for section 12022.53(d) PC is an additional and consecutive term of 25 years to life;" and (2) trial counsel submitted on this report at sentencing, stating "it looks like it's in line with what the conviction carries."

The People contend the language in the probation officer's report is not dispositive. According to the People, section 12022.53, subdivision (d) makes imposition of the 25 years-to-life enhancement mandatory, unless the court strikes the enhancement under subdivision (h).

"Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, *shall* be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d), italics added.)

The People further assert the record fails to show the trial court was relying on the probation report in imposing the firearm enhancement. According to the People, trial courts are presumed to be aware of and to have followed existing law.

Though we acknowledge subdivision (d) of section 12022.53 makes imposition of the enhancement mandatory by operation of the word "shall," nothing in the probation officer's report clarified the enhancement could nonetheless be stricken in the interest of justice under subdivision (h) of the statute. Nonetheless, we cannot simply presume the trial court reflexively adopted the probation officer's report in declining to strike the firearm use enhancement, or that the court relied upon counsel's assertion that the report was in line with what the conviction carries.

The record is silent as to whether the trial court misunderstood its sentencing discretion. The court did not make any comments during sentencing which would support the inference it believed it lacked discretion to strike the gun use enhancement. Under the circumstances, we cannot simply presume error. "[R]emand is unnecessary if

the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.) " '[A] trial court is presumed to have been aware of and followed the applicable law.' " (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.)

B. Ineffective Assistance of Counsel

Hernandez asserts trial counsel was constitutionally ineffective for failing to apprise the court of its discretion to strike the gun use enhancement, and to correct misstatements made in the probation officer's report.

At a minimum, counsel should have corrected the erroneous statement in the probation officer's report, even if he believed asking the court to strike the enhancement would have been a futile endeavor. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile."].) However, even assuming error, Hernandez has failed to show prejudice as a result of counsel's omission.

To prevail on the prejudice prong of a claim of ineffective assistance of counsel, Hernandez must "affirmatively prove[ ]" prejudice, meaning he must demonstrate not merely a possibility that he would have qualified for resentencing, but " '[a] reasonable probability.' " (*People v. Maury* (2003) 30 Cal.4th 342, 389.) That showing has not been made here. Not only does Hernandez's probation report bear out an extensive criminal history, evincing a pattern of crimes escalating in seriousness and violence, the circumstances of Vasquez's murder were heinous. Indeed, Hernandez himself offers no argument which would support the conclusion that he was prejudiced from trial counsel's presumed error. We therefore reject Hernandez's claim of ineffective assistance of counsel.

III. Remand is Not Warranted for a *Franklin* Hearing

In a supplemental brief, Hernandez claims he is entitled to a remand for a *Franklin* hearing so that he can "make a record of information relevant to his eventual youth

offender parole hearing." (*Franklin, supra*, 63 Cal.4th at p. 284.) Although recognizing his case is in a different procedural posture than those typically afforded remand for such a hearing—because the youth offender parole hearing statutes were in place at the time of his conviction and sentencing—Hernandez alleges ineffective assistance of counsel for trial counsel's failure to request a *Franklin* hearing. The People argue Hernandez has already had a full opportunity to make a record of facts relevant to his future youth offender parole hearing. The People further contend the record does not support Hernandez's claim of ineffective assistance of counsel.

We agree with the People. Hernandez has failed to carry his claim of ineffective assistance of counsel upon this record. Nonetheless, we affirm without prejudice to Hernandez filing a motion for a *Franklin* proceeding under the authority of section 1203.01 and *In re Cook* (2019) 7 Cal.5th 439, 460 (*Cook*).) If the court determines Hernandez is entitled to a *Franklin* hearing, then both parties should be permitted "to put on the record any relevant evidence that demonstrates [Hernandez's] 'culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.' " (*In re Loza* (2018) 27 Cal.App.5th 797, 807.)

A. *Franklin* Hearing

On October 11, 2017, then Governor Brown signed into law Assembly Bill No. 1308, which amended section 3051 to raise the age of those eligible for youth offender parole hearings from those who were under 23 years old to those who were 25 years of age or younger when they committed their controlling crime. (Stats. 2017, ch. 675, § 1 [eff. Jan. 1, 2018].) Under current law, a person who committed an offense when he was 25 years of age or younger for which the sentence is a term of 25 years to life is eligible for release at a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).)

Hernandez was 23 years old at the time of the murder. He was sentenced on April 4, 2018, approximately three months after he became eligible for a youth offender parole

hearing following the enactment of Assembly Bill No. 1308. Thus, Hernandez had the opportunity to request a *Franklin* hearing. And, although he did not present mitigating youth-related evidence at sentencing, "[t]he record does not indicate that [Hernandez's] opportunity to exercise [his] right [to present *Franklin* evidence] was inadequate in any respect. Rather, it appears that he merely failed—whether by choice or by inadvertence—to exercise it." **(***People v. Medrano* (2019) 40 Cal.App.5th 961, 967.) Consequently, the record does not support remanding Hernandez's cases for purposes of allowing him to request a *Franklin* hearing.

B. Ineffective Assistance of Counsel

With respect to a claim of ineffective assistance of counsel, " ' "[r]eviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." ' " (*People v. Lucas* (1995) 12 Cal.4th 415, 437, citing *People v. Zapien* (1993) 4 Cal.4th 929, 980.) Here, there may be a rational purpose for counsel's failure to request a *Franklin* hearing. As our Supreme Court observed in *Cook, supra,* 7 Cal.5th at page 459, some offenders may choose "to forgo a *Franklin* proceeding altogether. Delving into the past is not always beneficial to a defendant."

Even assuming Hernandez could show trial counsel's performance fell below a standard of reasonable competence, proving prejudice under the circumstances is a speculative proposition. Hernandez has failed to identify any specific information that he would have presented had trial counsel requested a *Franklin* hearing on his behalf. We can therefore only guess what evidence trial counsel would have presented to the trial court and whether that evidence would have been beneficial to Hernandez.

Additionally, even if this Court were to decline Hernandez's request for a limited remand, Hernandez is not foreclosed from seeking a *Franklin* hearing. Our Supreme Court has held that a youthful offender whose conviction and sentence are final may file a motion under section 1203.01 to make a record of youth-related mitigating evidence.

(*Cook*, *supra*, 7 Cal.5th at pp. 446-447.) Because Hernandez still has the opportunity to seek a *Franklin* hearing, prejudice has not been shown as a result of counsel's presumed error in failing to request such a hearing.

IV. Remand is Not Warranted for a Hearing on Hernandez's Ability to Pay the Restitution Fine

After Hernandez was sentenced, the trial court imposed a restitution fine in the amount of $10,000 (§ 1202.4, subd. (b)(1)); a $5,000 victim restitution fine (§ 1202.4, subd. (f)); a parole revocation restitution fine (§ 1202.45), which was stayed; a $40 court operations assessment (§ 1465.8, subd. (a)(1)); and a $30 criminal assessment (Gov. Code, § 70373, subd. (a)(1)).

Hernandez now contends the $10,000 restitution fine must be stayed and this case must be remanded back to the lower court so that he may request a hearing on his ability to pay.[4] He does not directly address imposition of the court operations assessment, the criminal operations assessment, or the victim restitution fine. We therefore assume that he does not challenge imposition of these fines and fees as he has provided no argument specific to them.

Hernandez's restitution fine was set at $10,000, the maximum amount permissible under section 1202.4, subdivision (b)(1). It is undisputed that Hernandez failed to object to imposition of the fine, and the record fails to show he asserted an inability to pay. We therefore conclude Hernandez has forfeited his ability to challenge the restitution fine on appeal.

---

4 Our Supreme Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844 (*Kopp*). The California Supreme Court limited review in Kopp to whether courts must consider a defendant's ability to pay in imposing fines, fees and assessments; and, if so, which party bears the burden of proof.

A. Due Process Challenge

The People argue Hernandez has forfeited his ability to challenge the restitution fine because he failed to object to imposition of the fine at sentencing. Relying upon *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*) and *People v. Johnson* (2019) 35 Cal.App.5th 134 (*Johnson*), Hernandez argues this issue has not been forfeited.

"Both *Castellano* and *Johnson* involved situations in which the trial court imposed the statutory *minimum* restitution fine." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032.) Here, the trial court imposed the statutory *maximum* restitution fine.

This distinction is important because even though Hernandez was sentenced prior to *Dueñas, supra, 30 Cal.App.5th 1157, Hernandez had the incentive and ability to object to the imposition of a maximum restitution fine based upon an inability to pay.* Subdivision (c) of section 1202.4 states that "[i]nability to pay may be considered *only* in increasing the amount of the restitution fine *in excess of the minimum fine* pursuant to paragraph (1) of subdivision (b)." (Italics added.) However, where only the statutory minimum is imposed, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit consideration of a defendant's ability to pay.

As a result, many appellate courts have found forfeiture of an asserted inability to pay a maximum restitution fine where the appellant failed to object in the trial court. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant forfeited challenge to $10,000 restitution fine imposed under section 1202.4 by failing to object at his sentencing hearing]; *People v. Taylor* (2019) 43 Cal.App.5th 390, 400-401 [defendant forfeited objection to $10,000 restitution fine]; *People v. Aviles* (2019) 39 Cal.App.5th 1055 [rejecting the defendant's futility argument where restitution fines above the statutory minimum were imposed]; *People v. Jenkins* (2019) 40 Cal.App.5th 30, 40 [finding forfeiture where the defendant "had the statutory right to object to $9,700 of the $10,000 restitution fine imposed by the court, but did not do so"].)

Here, because the restitution fine was set above the statutory minimum, the court was permitted to consider Hernandez's asserted inability to pay. (*People v. Taylor, supra,* 43 Cal.App.5th at pp. 399-400.) Consequently, by failing to object below, Hernandez has forfeited his assertion that the court failed to consider his ability to pay.

Even if his claim were not forfeited, we would reject Hernandez's assertion that an ability to pay hearing was required before imposition of the punitive restitution fine. As we explained in *People v. Son* (2020) 49 Cal.App.5th 565 at pages 578-579: "[I]n light of the United States Supreme Court precedents clarifying that, under the Constitution, indigency is not a bar to enforcement of monetary judgments arising from unpaid fines imposed as punishment, we disagree with *Dueñas* to the extent it … holds an ability to pay hearing is constitutionally required before imposition of the restitution fine."

B. Excessive Fines Challenge

Hernandez contends "the imposition of fines, fees, and assessments without a determination of an ability to pay may also violate a defendant's Eighth Amendment protection against excessive fines." He does not offer an argument explaining how the restitution fine imposed here was excessive, nor does he explain how his Eighth Amendment argument has not been forfeited bases upon counsel's failure to object below.[5] As a result, we decline to reach Hernandez's claim.

---

5 Although we do not address the issue of forfeiture, we observe that California courts have held prior to *Dueñas* and *Timbs v. Indiana* (2019) 586 U.S. ___ [139 S.Ct. 682, 203 L.Ed.2d 11], that an ability to pay is relevant to excessiveness. "[T]hey have done so in applying both the Eighth Amendment and article I, section 17 of the California Constitution." (*People v. Cowan* (2020) 47 Cal.App.5th 32, 47, review granted June 17, 2020, S261952, citing *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2005) 37 Cal.4th 707, 728.) Still, it cannot be ignored that excessive fines objections have occurred primarily "in published California appellate cases only in the civil context and only in commercial litigation, generally for corporate entities." (*Cowan*, at p. 71 [con. opn. Streeter, J.].) Though no objection was lodged here, our Supreme Court's resolution of this issue may call for further consideration of Hernandez's argument.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. [Citations.] [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334 (*Bajakajian*).) Thus, the Eighth Amendment concerns the amount of a fine imposed, not just its imposition.

In determining whether a fine violates the Eight Amendment, the *Bajakajian* court set out four factors: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728, citing *Bajakajian*, *supra*, 524 U.S. at pp. 337-338, 118 S.Ct. 2028.)

To the extent a defendant challenges fines and fees based only upon indigency, or his or her incarceration, "such fines and fees are not 'excessive' in violation of the Eight amendment of the federal Constitution, or article I, section 17 of our state Constitution, based on the *Bajakajian* 'considerations.' " (*People v. Gutierrez*, *supra*, 35 Cal.App.5th at p. 1041 [conc. opn. of Benke, J.].)

Here, Hernandez has provided no analysis pertinent to the considerations set forth in *Bajakajian*. And, with respect to Hernandez's ability to pay, the record does not permit us to independently determine whether he has the ability to pay the restitution fine imposed. While some evidence exists in the record which bears upon Hernandez's ability to pay, we simply cannot presume the instant record represents a complete representation of his financial circumstances. The record contains no information as to whether Hernandez earns prison wages, if he receives financial support from family or friends, or what his future earning capacity may be. The issue of his ability to pay the restitution fine was never raised in the trial court below. As a result, the existing record is necessarily incomplete. Insofar as neither the argument on appeal nor evidence in the

appellate record permits us to determine whether the restitution fine imposed here was excessive, we decline Hernandez's request to strike the fine.

DISPOSITION

The judgment of conviction is affirmed.

SMITH, J.

I CONCUR:

POOCHIGIAN, Acting P.J.

MEEHAN, J. – Concurring.

I concur in the opinion and judgment but do not join fully in the majority's reasoning in part IV. of the Discussion. I agree that Hernandez forfeited his claim challenging imposition of the $10,000 restitution fine, advanced pursuant to the decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, because he failed to exercise his statutory right to object. (Pen. Code, § 1202.4, subds. (c), (d); *People v. Montelongo* (2020) 55 Cal.App.5th 1016, 1033–1035; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032.) As this resolves the claim raised on appeal, I do not join in the remainder of the majority's reasoning in part IV. of the Discussion.

MEEHAN, J.